A **BINA MYK SDN BHD v. VVO CONSTRUCTION SDN BHD**

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: W-02(C)(W)-2137-11-2016]
20 NOVEMBER 2017

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside decision of adjudicator – Appellant engaged to perform sub-contract works – Claim*
C *for payment on works done – Whether there was a written contract between respondent and appellant – Whether appellant's claim fell within scope of Construction Industry Payment And Adjudication Act 2012 – Whether adjudicator had jurisdiction to hear claim – Whether decision tainted with excess of jurisdiction – Whether High Court could hear appeal when there was no such provision under*
D *Construction Industry Payment And Adjudication Act 2012*

CIVIL PROCEDURE: *Pleadings – Issue not pleaded – Whether court ought to ignore issues not pleaded – Whether parties bound by their pleadings*

The respondent ('VVO Construction') appointed MYK Construction as its
E subcontractor to do certain piping works at an abandoned housing project. MYK Construction did not have any executed contract with VVO Construction. Despite that, MYK Construction, by a letter dated 30 July 2015, informed VVO Construction that it had assigned the subcontract to the appellant ('Bina MYK'). VVO Construction then instructed MYK Construction and its subcontractor to cease works. Bina MYK replied to
F accept the cessation of works and demanded payment in the sum of RM548,793.80. Bina MYK then started an adjudication process by serving a payment claim for the sum of RM548,793.80 on VVO Construction. VVO Construction filed an adjudication response premised on the ground that s. 6(4) of the Construction Industry Payment and Adjudication Act 2012
G ('CIPAA 2012') was not applicable to the claim of Bina MYK as there was no executed written contract with Bina MYK. At the adjudication process, VVO Construction contended that the purported assignment of the construction contract to Bina MYK by MYK Construction was invalid and not binding on VVO Construction. It was further contended that since there
H was no written construction contract between VVO Construction and Bina MYK, the adjudicator had no jurisdiction as s. 2 of the CIPAA 2012 provides that CIPAA 2012 could only apply if there was a 'construction contract in writing'. The adjudicator did not find merit in the contention of VVO Construction and sustained the claim of the Bina MYK. Bina MYK then
I made an application to the High Court to enforce the adjudication decision

with VVO Construction taking out an application to set aside the adjudication decision. The High Court dismissed the application of Bina MYK and allowed the application of VVO Construction which resulted in the adjudication decision being set aside. Hence, the present appeal. The issues that arose for determination, *inter alia*, were (i) whether the High Court could entertain an appeal when there was no such provision under CIPAA 2012; and (ii) whether the High Court Judge committed an error in law in considering the issue of whether there was a contract in writing between parties when this was not an issue raised in the originating summons.

Held (dismissing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) Parties are not allowed to deal with issue not raised in their pleadings. However, there is always exception to the general rule and that is when it is a question of law especially regarding the initial jurisdiction of the tribunal. If the CIPAA 2012 did not clothe jurisdiction on an adjudicator in respect of a dispute, the court was duty bound to make such declaration irrespective of whether it was not contained in the pleadings. The court cannot shirk from its responsibility. In any event, jurisdictional challenge has always been and continues to be allowed by the courts at any stage of proceeding. Hence, the contention of the Bina MYK's that the High Court had erred in considering the jurisdiction point was dismissed. (paras 26, 27 & 28)

(2) It could not be denied that there was never any contract, be it in writing or otherwise, between VVO Construction and Bina MYK prior to the alleged assignment. The courts have always been strict in interpreting any document to be one of a valid assignment. On the facts of the case, it was never pleaded that the so-called assignment was an absolute assignment clothing Bina MYK to launch this claim. Here, there was no 'construction contract made in writing', a condition precedent to the applicability of CIPAA 2012. (paras 32 & 34)

Bahasa Malaysia *Headnotes*

Responden ('VVO Construction') melantik MYK Construction sebagai subkontraktor untuk melakukan kerja paip tertentu di sebuah projek perumahan yang terbengkalai. MYK Construction tidak mempunyai kontrak dengan VVO Construction. Walaupun demikian, MYK Construction dengan surat bertarikh 30 Julai 2015 memaklumkan VVO Construction bahawa ia telah memberikan subkontrak kepada perayu ('Bina MYK'). VVO Construction kemudian mengarahkan MYK Construction dan subkontraktornya untuk menghentikan kerja. Bina MYK menjawab menerima pemberhentian kerja dan menuntut bayaran sebanyak RM548,793.80. Bina MYK kemudian memulakan proses adjudikasi dengan menuntut bayaran sebanyak

A RM548,793.80 terhadap VVO Construction. VVO Construction memfailkan balasan adjudikasi atas alasan bahawa s. 6(4) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA 2012') tidak terpakai bagi tuntutan Bina MYK kerana tiada kontrak bertulis yang dilaksanakan dengan Bina MYK. Dalam proses adjudikasi, VVO Construction menghujahkan B bahawa penyerahan kontrak pembinaan kepada Bina MYK oleh MYK Construction adalah tidak sah dan tidak mengikat VVO Construction. Ia selanjutnya menghujahkan bahawa oleh kerana tiada kontrak pembinaan bertulis antara VVO Construction dan Bina MYK, adjudikator tidak mempunyai bidang kuasa kerana s. 2 CIPAA 2012 memperuntukkan bahawa C CIPAA 2012 hanya boleh diguna pakai jika terdapat 'kontrak pembinaan secara bertulis'. Adjudikator membuat dapatan bahawa VVO Construction tidak bermerit dan membenarkan tuntutan Bina MYK. Bina MYK kemudian membuat permohonan kepada Mahkamah Tinggi untuk menguatkuasakan keputusan adjudikasi sementara VVO Construction membuat permohonan untuk mengetepikan keputusan adjudikasi tersebut. Mahkamah Tinggi D menolak permohonan Bina MYK dan membenarkan permohonan VVO Construction yang mengakibatkan keputusan adjudikasi diketepikan. Oleh itu rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan, antara lain, adalah (i) sama ada Mahkamah Tinggi boleh mendengar rayuan apabila tidak ada peruntukan sedemikian bawah CIPAA 2012; dan (ii) sama ada Hakim E Mahkamah Tinggi terkhilaf dari segi undang-undang dalam mempertimbangkan isu sama ada terdapat kontrak secara bertulis antara pihak-pihak apabila ini bukanlah suatu isu yang diplidkan dalam saman pemula.

Diputuskan (menolak rayuan dengan kos)

Oleh David Wong Dak Wah HMR menyampaikan penghakiman F mahkamah:

(1) Pihak-pihak tidak dibenarkan membangkitkan isu yang tidak diplidkan dalam pliding mereka. Walau bagaimanapun, selalu ada pengecualian kepada peraturan am dan itu adalah ketika ia menjadi persoalan undang-undang terutama mengenai bidang kuasa awal tribunal. Sekiranya G CIPAA 2012 tidak memberikan bidang kuasa pada adjudikator berkenaan pertikaian, mahkamah bertanggungjawab untuk membuat deklarasi tersebut tidak kira sama ada ia tidak diplidkan dalam rayuan. Mahkamah tidak boleh melarikan diri dari tanggungjawabnya. Dalam apa jua keadaan, pertikaian bidang kuasa adalah sentiasa dan terus H dibenarkan oleh mahkamah di mana-mana tahap prosiding. Oleh itu, hujahan Bina MYK bahawa Mahkamah Tinggi telah terkhilaf dalam isu bidang kuasa ditolak.

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(2) Tidak boleh dinafikan bahawa tidak ada kontrak secara bertulis atau sebaliknya antara VVO Construction dan Bina MYK sebelum penyerahhak subkontrak diberikan. Mahkamah sentiasa tegas dalam mentafsirkan mana-mana dokumen untuk menjadi salah satu penyerahhak yang sah. Berdasarkan fakta kes, tidak diplidkan bahawa subkontrak yang diberikan adalah mutlak yang memberi hak kepada Bina MYK untuk melancarkan tuntutan ini. Di sini, tidak terdapat 'kontrak pembinaan yang dibuat secara bertulis', suatu pra-syarat terhadap kebolehgunaan CIPAA 2012.

Case(s) referred to:

Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd [2015] 8 CLJ 728 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Meenakshi Naidoo v. Subramaniya Sastri (1887) LR 141 A 160 ***(refd)***

United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd [1988] 3 MLJ 352 ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 2, 6(4), 15, 16
Rules of Court 2012, O. 55A r. 1

Other source(s) referred to:

Sir Peter Coulson, *Coulson on Construction Adjudication,* Oxford University Press, 2011, pp 85-86

For the appellant - T Kuhendran & R Kalaiarasan; M/s Zul Rafique & Partners
For the respondent - Amarjeet Singh; M/s Zubeda & Amarjeet

[Editor's note: For the High Court judgment, please see VVO Construction Sdn Bhd v. Bina MYK Sdn Bhd & Another Case [2017] 1 LNS 2179 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This appeal related to the decision of the High Court on 11 October 2016 in which the learned judge set aside the adjudication decision dated 15 June 2016 (adjudication decision).

[2] The appellant is the plaintiff in the High Court and it had succeeded in its claims for payment before the learned adjudicator. The respondent took an application before the High Court to set aside the adjudication decision and was successful, resulting in this appeal.

[3] We heard the appeal and dismissed the same for reasons we now give.

[4] The appellant and the respondent for ease of reference will be respectively referred to as Bina MYK and VVO Construction respectively.

Background Facts

[5] The appellant was the claimant in the adjudication process while the respondent in this appeal was the respondent in the adjudication process. The circumstances in which the claim was made by the appellant in the adjudication process were these.

[6] VVO Construction had appointed MYK Construction as its subcontractor to do certain piping works at an abandoned housing project at Rawang, in the district of Gombak, Selayang. VVO Construction was the main contractor of the aforesaid housing project.

[7] MYK Construction did not have any executed contract with VVO Construction. Despite that, MYK Construction by a letter dated 30 July 2015 informed VVO Construction that it had assigned the subcontract to Bina MYK, the claimant in the adjudication process.

[8] VVO Construction, by a letter dated 18 August 2015, instructed MYK Construction and its subcontractor to cease works. Instead of MYK Construction replying, Bina MYK on 27 August 2015 replied to accept the cessation of works and demanded payment in the sum of RM548,793.80. Bina MYK Construction was a sole proprietorship with one Yusri bin Ahmad as the sole proprietor. MYK Construction is corporation registered under the Companies Act 1965.

[9] Bina MYK started the adjudication process by serving a payment claim for the sum of RM548,793.80 on VVO Construction. That payment claim together with the notice of adjudication and request to appoint an adjudicator was all signed by one Jeffrey Lim who was designated as the project director.

[10] VVO Construction did not file any response and pursuant to s. 6(4) of the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012), VVO Construction was deemed to have disputed the claim. It did not file the payment response premised on the ground that CIPAA 2012 was not applicable to the claim of Bina MYK as there was no executed written contract with Bina MYK. It had informed KLRCA concerning the applicability of CIPAA 2012 to the aforesaid claim. KLRCA advised VVO Construction to raise this issue of applicability to the claim at the adjudication process before the learned adjudicator. VVO Construction then filed an adjudication response premised on the aforesaid ground.

[11] Prior to the adjudication process, it was discovered by VVO Construction that the aforesaid Jeffrey Lim had been made a bankrupt on 22 December 2003 and the same was informed to the learned adjudicator.

[12] At the adjudication process, VVO Construction from the outset of the hearing raised the issue of jurisdiction of the learned adjudicator on the ground alluded to by us earlier, that is, the absence of written contract between VVO Construction and Bina MYK. It was the contention of VVO Construction that its construction contract was with MYK Construction and no one else. It was also contended that the purported assignment of the construction contract to Bina MYK by MYK Construction on 30 July 2015 was invalid and not binding on VVO Construction. And hence it was submitted that since there is no such written construction contract, the learned adjudicator had no jurisdiction as s. 2 of the CIPAA 2012 provides that CIPAA 2012 can only apply if there is a "construction contract in writing".

[13] The learned adjudicator did not find merit in the aforesaid contention of VVO Construction and proceeded to hear the claim of Bina MYK. At the end of the adjudication process, the learned adjudicator sustained the claim of the Bina MYK.

High Court

[14] Bina MYK then made an application to enforce the adjudication decision with VVO Construction taking out an application to set aside the adjudication decision. Hence there were two applications before the High Court and the learned judge correctly dealt with the two matters together.

[15] The learned judge dismissed the application of Bina MYK and allowed the application of VVO Construction which resulted in the adjudication decision being set aside.

[16] Before the learned judge, he was faced with the following issues:

(i) the irregularity of the originating summons filed by VVO Construction;

(ii) the jurisdiction of the High Court in entertaining the application of the VVO Construction;

(iii) the effectiveness of the purported assignment by MYK Construction of the subcontract to Bina MYK;

(iv) the effect of the bankruptcy status of the said Jeffrey Lim.

[17] In respect of issue 1, Bina MYK had contended that the originating summons of VVO Construction had referred to O. 55A r. 1 of the Rules of Court 2012, which reads as follows:

Appeals to the High Court under written law (O. 55A, Rules 1)

1(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by way of an originating summons setting out the grounds of the appeal and supported by an affidavit, and if the Court so directs at the hearing of the appeal, by way of oral evidence.

[18] Premised on that reference of O. 55A r. 1, Bina MYK submitted that adjudication decisions are not subject to appeals to the High Court under CIPAA 2012 as there is no such provision. The relevant provision relating to adjudication decisions is s. 15 of the CIPAA 2012 which reads as follows:

15. Improperly procured adjudication decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) there has been a denial of natural justice;

(c) the adjudicator has not acted independently or impartially;

(d) the adjudicator has acted in excess of his jurisdiction.

[19] The learned judge agreed with submission of Bina MYK but after analysing the law and the consequences of mounting an appeal where there is no such right in respect of an adjudication decision, the learned judge proceeded to hear the originating summons of VVO Construction premised on the "consent" of the parties which Bina MYK complained to us that there was no such consent which we shall deal later in our grounds.

[20] In respect of issue 2 which related to the High Court's jurisdiction to hear the originating summons of VVO Construction, it was contended by Bina MYK that as the learned adjudicator had determined his jurisdiction to hear the claim, the High Court had no right to question the decision of the learned adjudicator. The learned judge however rejected the contention and held that it was a jurisdiction issue, hence he had every right to hear the aforesaid originating summons.

[21] In respect to issue 3 which related to the effectiveness of the assignment by Bina MYK, the learned judge found that the aforesaid assignment to be an ineffective instrument. His rationale is as that stated in paras. 34 and 35 of his grounds which read as follows:

[34] As it has not been pleaded that the assignment is an absolute assignment and that it is in writing and executed by the assignor, the debtor here VVO Construction, has a right to object to being sued by the Claimant. It has not been shown that the assignment was in writing and

much less has it been determined that the assignment is an absolute assignment, conferring a right for the assignee the Claimant here to bring an action against the debtor.

[35] It is even more pertinent when the contract that is being assigned has to be in writing and so any assignment has to be in writing too for the construction contract on which an Adjudication is brought to be in writing. The absolute assignment being a critical document for the passing of legal rights, has to be in writing both in meeting the requirement of section 4(3) Civil Law Act 1956 and also that of section 2 CIPAA in that the construction contract has to be in writing.

[22] In respect of issue 4 which related to the status of bankruptcy of Jeffrey Lim, the learned judge found as a fact that Jeffrey Lim as a bankrupt had flouted the bankruptcy law when he had appointed nominees to act for him. As for the conduct of Jeffrey Lim, the learned judge examined the relevant bankruptcy law and concluded by saying the following:

[56] I would hold that clearly the bankrupt Mr Jeffrey Lim cannot use the front and façade of the Claimant company to conduct business in breach of section 38(1)(d) and then to use it to pursue Adjudication in breach of section 38(1)(a) and further now to oppose the setting aside proceeding commenced by VVO Construction and to commence another proceeding to enforce the Adjudication Decision; all without the sanction of the DGI as Official Assignee.

[57] The Bankruptcy Act 1967 prohibits the above actions of the said bankrupt Mr Jeffrey Lim and to allow the bankrupt to use the facility of statutory Adjudication and now legal proceedings in a court of law, would be to make a mockery of the bankruptcy laws and to bring the law into disrepute.

[58] To allow the said bankrupt to enforce the Adjudication Decision would be to send the wrong message that it is perfectly proper for a bankrupt to use the vehicle of a business or a company to carry on business under the names of nominees and so pursue legal action in Adjudication and in court to enforce an Adjudication Decision with no impediment or inhibition for that is perfectly proper and permitted.

Our Grounds Of Decision

Can The Court Entertain An Appeal When There Is No Such Provision Under CIPAA 2012?

[23] In regard to the Bina MYK contention that the learned judge had erred in hearing the originating summons as if it is an application under s. 15 of CIPAA 2012 to set aside the adjudication decision, we found no merit on the same. We agreed that VVO Construction had on the face of originating summons was pursuing an appeal which is unknown under the CIPAA 2012 (see *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 8

CLJ 728). Be that as it may, VVO Construction in his intitulement of the originating summons had referred to ss. 15 and 16 of CIPAA 2012 which provided for the setting aside of adjudication decisions. In this day and age, the courts have always been slow to sustain such objection which is nothing but technical in nature. Gone are those days where we find that law journals contain substantial numbers of judgment regarding counsel's failure to comply with the formalities of the rules. The courts' primary purpose is always to dispense substantial justice and as such should be the master of the rules and not subservient to them. In the case before us, there was little doubt the intention of the VVO Construction was to set aside the adjudicator's decision and Bina MYK knew it. Hence the appellant had not suffered any prejudice before the High Court.

Did The Learned Judge Commit An Error In Law In Considering The Issue Of Whether There Was A Contract In Writing Between Parties When This Was Not An Issue Raised In The ORIGINATING SUMMONS And Further That This Issue Had Been Referred To And Decided By The Learned Adjudicator?

[24] On this issue, learned counsel for the appellant relied on Sir Peter Coulson, *Coulson on Construction Adjudication* (Oxford University Press 2011) at 85-86 where the learned author opined as follows:

> What Happens if there is a Jurisdiction Issue?
>
> If the responding party challenges the jurisdiction of the adjudicator, it has four options. Firstly, the responding party can agree to refer the dispute as to the adjudicator's jurisdiction to the same adjudicator, and to be bound by the results. If the responding party agrees to that course, and the appointed adjudicator accepts the reference to him of his secondary dispute, the jurisdiction of the adjudicator can then be resolved as part of the reference. The important thing is about this option is that the responding party is bound by the adjudicator's decision and cannot subsequently challenge it, or seek to resist enforcement on the grounds that the adjudicator lacked the necessary jurisdiction. In consequence, there have been a large number of cases in which the claimant has agreed that the defendant agreed to be bound by the adjudicator's decision on jurisdiction, and the defendant has denied such an agreement. Those cases are analysed in paragraphs 7.09-7.16 below.
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> It does not mean, however, that every objection will amount to a sufficient reservation of the objector's position. The best recent example of a finding that the position had not been adequately reserved was in the *Allied P&L* case itself. There, on the basis of a detailed analysis of the various documents, Akenhead J concluded that there had been no valid or effective jurisdictional reservation by Paradigm on the ground that, prior to the adjudication, no dispute had crystallised as to Allied's claim for the financial consequences of the unlawful termination of the contract. Whilst Paradigm had raised a number of jurisdictional objections, each

> one of which was held to be unfounded, they had not objected to the adjudicator's jurisdiction on the crystallisation issue. The judge found that they had acceded to his jurisdiction to resolve all the claims which were the subject matter of the referral, including the claim for damages due to the termination, subject only to the failed objections, which were of no account. So, although the Judge found that they could have objected on the crystallisation issue, they failed so to so, and therefore gave him jurisdiction on that issue as well. The case therefore operates as a stark warning to parties in adjudication to ensure that their objection on jurisdiction are carefully and properly formulated.

[25] Premised on the above opinion, learned counsel submitted that the adjudicator's decision cannot be reviewed as the learned adjudicator had dealt with the merits of the jurisdiction issue. That decision of the learned adjudicator reads as follows:

> At the beginning of the hearing, the Respondent agreed that there is a contract between the Respondent and MYK Construction the sub-contractor. Notwithstanding the said agreement I find that the tender documents, schedule of prices, progress claims and exchange of communications between the parties is evidence of a contract in writing as envisaged by the Act.
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> The letter dated 30.7.2015 by the sub-contractor to the Respondent informing that the contract had been assigned to the Claimant is clear and unequivocal. The Respondent based on the said letter made payment of RM20,000.00 to the Claimant after its cease work letter to the sub-contractor implying acceptance of the assignment. Thereafter the Respondent has refused to make further payments. The Claimant is therefore an unpaid party as stipulated under CIPAA.

[26] We conceded that generally speaking, parties are not allowed to deal with issue not raised in their pleadings. But, as usual, there is always exception to the general rule and that is when it is a question of law especially regarding the initial jurisdiction of the tribunal. In the context of CIPAA 2012, an adjudicator derives his or her jurisdiction from a statutory source and from nowhere else. Put simply, if CIPAA 2012 does not clothe jurisdiction on an adjudicator in respect of a dispute, the court is duty-bound to make such declaration irrespective of whether it is not contained in the pleadings. This sort of jurisdiction also cannot be conferred by consent or by waiver culminating from the conduct of parties. As long as it has been picked up in the submissions of respective counsel, the court cannot shirk from its responsibility.

[27] In any event, jurisdictional challenge has always been and continues to be allowed by the courts at any stage of proceeding. We can do no better than refer to the Privy Council case of *Meenakshi Naidoo v. Subramaniya Sastri* (1887) LR 141 A 160 which concerned the jurisdiction of the High Court at

Madras where neither the parties nor the High Court raised the question of jurisdiction to hear an appeal from the District Court. The High Court then reversed the decision of the District Judge. On appeal to the Privy Council, it was held that consent or waiver could not cure the absence of jurisdiction. Sir Richard Baggallay, when delivering the advice of the Board said (at p. 166):

> It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v. Bull* LR 13 IA 144, as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: 'The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

[28] Hence, we dismissed the contention of the Bina MYK's learned counsel that the court had erred in considering this jurisdiction point.

Was There A Contract In Writing?

[29] In CIPAA 2012, s. 2 specifically provides that the Act applies to every "construction contract made in writing". In other words, the adjudicator would have no jurisdiction to adjudicate a dispute arising from an oral contract.

[30] We agreed with the Bina MYK's contention that the phrase "contract in writing" should be construed widely and to include written correspondences between the parties in relation to the construction contract.

[31] Learned counsel for Bina MYK apart from supporting the reasoning of the learned adjudicator, also submitted that the VVO Construction was well aware of the assignment of the contract from MYK Construction to Bina MYK and in fact acknowledged such assignment by making payment of RM20,000 to Bina MYK after being notified of the assignment. The case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 was relied on by counsel to support his contention. In that case, the Federal Court per Sri Ram JCA, as he then was, in delivering the judgment of the court, held as follows:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
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> The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so influenced by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights' (per Robert Goff J in *Amalgamated Investment* [19821 1 QB 84 at p 105 of the report.)

[32] With respect, learned counsel's contention was misconceived. Firstly, it cannot be denied that there was never any contract be it in writing or otherwise between VVO Construction and Bina MYK prior to the alleged assignment. Whether there was a valid assignment must be considered within the circumstances in which it was made. As rightly pointed out by the learned judge, the courts have always been strict in interpreting any document to be one of a valid assignment. In the case at hand, it had suffered a fatal flaw in that it was never pleaded that the so-called assignment was an absolute assignment clothing Bina MYK to launch this claim. We have read the rationale of the learned judge (which are set out above in para. 21) and we saw no error in the same. Furthermore, there cannot be any estoppel against statute (see *United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd* [1988] 3 MLJ 352).

A *Bankruptcy Status Of Jeffrey Lim*

[33] In light of our views above, we found it unnecessary to deal with this issue. In any event, the learned judge had exhaustively dealt with it and we have nothing more to add to the same.

B **Conclusion**

[34] This was a case where the adjudicator's initial jurisdiction was found wonting and when there was a challenge to such lack of jurisdiction in the context of CIPAA 2012, the court was duty-bound to adjudicate on the objection. Here there was no "construction contract made in writing", a C condition precedent to the applicability of CIPAA 2012.

[35] In the circumstances, we dismissed the appeal with costs in the sum of RM10,000 subject to payment of allocatur fees. We also ordered that the deposit be refunded to the appellant.

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